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No. _____

In the

Supreme Court of the United States

October Term, 1988

MARCIA LEE CARROLL,

Petitioner,

v.

EDWIN CHARLES MOORE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

MICHAEL E. THEW, Counsel of Record, and
RONALD E. BUCHER of
The Lancaster County Attorney's Office
555 South 10th Street
Lincoln, NE 68508
(402) 471-7609
Attorneys for Petitioner

JOE CHRISTENSEN, INC., 1540 Adams Street, Lincoln, Nebraska 68521

QUESTIONS PRESENTED FOR REVIEW

DOES AN INDIGENT DEFENDANT IN A PATERNITY ACTION INITIATED BY THE STATE, HAVE A CONSTITUTIONAL DUE PROCESS RIGHT TO A COURT-APPOINTED ATTORNEY?

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To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of The United States

The petitioner, Marcia Lee Carroll, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nebraska entered in the above-entitled action on May 20, 1988, and denied for rehearing by said court on July 21, 1988.

OPINIONS

Carroll v. Moore, 288 Neb. 561, __ N.W.2d __ (1988). For the Complete text of the opinion, see Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was entered on May 20, 1988. A timely motion for rehearing was denied on July 21, 1988, see Appendix B hereto, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION

Constitution of the United States, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 3, 1984, a paternity action was filed on behalf of the petitioner by the Lancaster County (Nebraska) Attorney's Office against the respondent. Respondent was

personally served with a summons and copy of said petition on March 25, 1985.

The respondent requested the Lancaster County District Court appoint an attorney to represent him in the paternity case. Respondent's request was made in the form of his response to the petition, filed with the Clerk of the Court, a copy of which is incorporated herein as Appendix C hereto. The response included a photocopy of a newspaper article in which the issue of an indigent paternity defendant's right to court-appointed counsel was discussed. The newspaper article specified that the claim to a court-appointed attorney was based upon a due process right. A hearing on respondent's request was held on August 19, 1985, at which respondent appeared pro se. At that hearing, the court denied respondent's request. The court's August 19, 1985, docket entry is incorporated herein as Appendix D hereto.

Subsequently, on March 26, 1986, a trial was held on the matter. The respondent again appeared pro se. The Lancaster County District Court found the respondent to be the father of the child in question and ordered child support be paid by respondent. An order was entered on April 2, 1986, and is incorporated herein as Appendix E hereto.

On or about May 1, 1986, respondent, with the assistance of his attorney provided by Legal Services of Southeast Nebraska, filed his notice to appeal the August 19, 1985, finding that respondent was not entitled to appointment of counsel and the April 2, 1986 order finding respondent to be the father of the minor child in question. The issue of respondent's due process right to appointed counsel was stated in respondent's prehearing conference statement, and is incorporated herein as Appendix F hereto.

The Supreme Court of the State of Nebraska, in its May 20, 1988, opinion, ruled that due process requires that an indigent defendant has an absolute right to court-appointed counsel in state-initiated paternity proceedings finding the

concepts of "fundamental fairness" and "meaningful opportunity to be heard", which are integral to the notion of due process, make the right to counsel mandatory.

ARGUMENT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE COURTS OF LAST RESORT OF OTHER STATES AS TO AN INDIGENT DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHT TO A COURT-APPOINTED ATTORNEY IN A PATERNITY ACTION INITIATED BY THE STATE.

Research provided by both petitioner and respondent to the Supreme Court of Nebraska detailed no less than sixteen (16) states which have addressed the issue in question.

The following cases would seem to be supportive of petitioner's position:

Franks v. Mercer, 401 So.2d 470 (La.App. 1981)

Sheppard v. Mack, 68 Ohio App.2d 95, 427 N.E.2d 522 (1980)

State v. James, 38 Wash.App. 164, 686 P.2d 1097 (1984)

State ex rel. Adult and Family Service Division v. Stoutt, 57 Or.App. 303, 644 P.2d 1122 (1982)

State ex rel. Hamilton v. Snodgrass, 325 N.W.2d 740 (Iowa 1982)

Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982) *cert. denied*, 459 U.S. 1113 (1983).

While the following cases would seem to be supportive of respondent's position:

Artibee v. Cheboygan Circuit Judge, 397 Mich. 54, 243 N.W.2d 298 (1976)

Corra v. Coll, 305 Pa.Super. 179, 451 A.2d 480 (1982)

Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979)

Kennedy v. Wood, 439 N.E.2d 1367 (Ind.App. 1982)

Reynolds v. Kimmons, 569 P.2d 799 (Alaska 1977)

Salas v. Cortez, 154 Cal.Rptr. 529, 593 P.2d 266, *cert. denied*, 444 U.S. 900 (1979)

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (W.Va. 1980).

Most of the above cases make reference to this Court's decision in *Matthews v. Eldridge*, 424 U.S. 319 (1976) and the subsequent use of the "*Eldridge* factors" in determining the extent of a party's due process rights, i.e.:

(1) the private interest at stake;

(2) the risk of erroneous results under current procedures, considered with the probable value of the suggested procedural safeguards; and

(3) the governmental interests at stake.

The "*Eldridge* factors" "have been further defined by this Court in *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), finding the decision to appoint counsel in parental termination proceedings should be left to the trial court, and *Little v. Streater*, 452 U.S. 1 (1981) which held that a State's procedure in paternity actions that denied blood grouping tests to indigent defendants was a due process violation.

The state court cases cited above present a clearly inconsistent application of this Court's prior decisions as well as a prominent conflict in the protection provided by the Fifth and Fourteenth Amendments to the United States Constitution.

In addition, a large part of any state's involvement in paternity proceedings is premised on title IV-D of the Social Security Act found in 42 U.S.C.A. §§ 651-655. This includes one state initiating a paternity action against an alleged father located in its jurisdiction on behalf of the mother and/or child which are located in a second state. (See Nebraska's Uniform Reciprocal Enforcement of Support Act § 42-762 et seq. R.R.S. 1943 (Reissue 1984)).

Thus the need for consistency in applying the constitutional rights of the alleged father is great.

In order to determine the extent of an indigent paternity defendant's constitutional rights, as well as to consistently and uniformly provide said rights, a decision of this Court is necessary to resolve the conflict which exists among the courts of last resort in numerous states.

It is asserted by the petitioner that an indigent paternity defendant in a state-initiated action is not entitled, under due process, to court-appointed counsel and that the Supreme Court of the State of Nebraska erred in so holding.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Nebraska Supreme Court.

Respectfully submitted,
MICHAEL E. THEW, Counsel of Record, and
RONALD E. BUCHER, of
The Lancaster County Attorney's Office
555 South 10th Street
Lincoln, NE 68508
(402) 471-7609
Attorneys for Petitioner

APPENDIX A

CARROLL V. MOORE
NO. 86-375—filed May 20, 1988.

1. Constitutional Law: Due Process. Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

2. Constitutional Law: Due Process: Right to Counsel. Under the U.S. Constitution, it is presumed that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.

3. —: —: —. Under the U.S. Constitution, the test that governs the due process right to court-appointed counsel is whether the absence of counsel deprives an indigent defendant of fundamental fairness. That test, in turn, involves an analysis of three separate factors: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.

4. Constitutional Law: Due Process: Right to Counsel: Paternity. Due process requires that an indigent defendant has an absolute right to court-appointed counsel in paternity proceedings.

Boslaugh, Caporale, Shanahan, and Grant, JJ., and Burkhard, D.J.

BOSLAUGH, J.

This was an action by the plaintiff, Marcia Lee Carroll, against the defendant, Edwin Charles Moore, to establish that the defendant was the father of the plaintiff's child born June 24, 1982. The plaintiff alleged that she had made application to the office of the county attorney for determination of paternity and support pursuant to Neb. Rev. Stat. § 43-512.02 (Reissue 1984).

The defendant's "answer" consisted of a letter enclosing a copy of a news article relating to two paternity suits then pending in this court.

Pursuant to a motion by the plaintiff, on July 5, 1985, the trial court ordered the plaintiff, the defendant, and the child to submit to blood tests. On the same day, the trial court wrote to the defendant, advising him that the court would appoint counsel for the defendant if he was indigent. On July 22, 1985, the defendant wrote to the court, stating that he would need appointed counsel.

At a hearing on August 19, 1985, the trial court advised the defendant that the court would not appoint counsel for him and that if the defendant wanted representation it was his responsibility to hire his own counsel. The court also advised the defendant that his "answer" would be treated as a general denial. The court allowed the defendant to use a blood test made in a previous case in lieu of a new test as ordered on July 5.

The case came on for trial on March 26, 1986, with the defendant appearing pro se.

The following report of the result of the test done on blood drawn from the defendant on July 9, 1985, and from the plaintiff and the child on July 23, 1985, was received in evidence without objection:

PATERNITY CASE REPORT

12-AUG-85

CHART NO.: 468791

CHILD: . . . SEX: . . .

DATE OF BIRTH: 6-24-82 PLACE OF BIRTH: ,

MOTHER: CARROLL MARCIA L DATE OF BIRTH: 6-5-47

PUTATIVE FATHER: MOORE EDWIN C DATE OF BIRTH: 8-9-50

RESULTS

CHILD				SAMPLE NO. 4380						
	ABO	A1	RH	R1R1	MNS	NSNS	KELL	kk	Fy	bb
	Jk	aa	Lu		P		Di		Gm	
	Km		ACP	BB	ESD	11	ADA	11	AK	11
	GPT	22	GLO	12	PGD	AA	HAPT	11	PGM1	1+2+
	GC	11	BF	SS	PI	M1M3	TNF	C1C2	C3	SF

MOTHER				SAMPLE NO. 4381						
	ABO	O	RH	R1R1	MNS	NSNs	KELL	kk	Fy	bb
	Jk	aa	Lu		P		Di		Gm	
	Km		ACP	AB	ESD	12	ADA	11	AK	11
	GPT	22	GLO	22	PGD	AA	HAPT	11	PGM1	1−2+
	GC	11	BF	SF	PI	M2M3	TNF	C1C1	C3	SF

PUTATIVE FATHER				SAMPLE NO. 4321						
	ABO	A1	RH	R1r	MNS	MNSs	KELL	kk	Fy	0
	Jk	aa	Lu		P		Di		Gm	
	Km		ACP	BB	ESD	11	ADA	11	AK	11
	GPT	12	GLO	12	PGD	AA	HAPT	11	PGM1	1+
	GC	11	BF	SF	PI	M1M1	TNF	C1C2	C3	SS

TYPE I EXCLUSIONS: NONE
TYPE II EXCLUSIONS: NONE

EXCLUSION RATE FOR CAUCASIANS	0.99901474
EXCLUSION RATE FOR BLACKS	0.99989253
EXCLUSION RATE FOR HISPANICS	0.99947333
PROBABILITY OF PATERNITY =	0.99991596

ODDS OF PATERNITY 11898. : 1

The letter accompanying the report stated that "99.99% of the male population has been excluded by this testing. Mr. Edwin Charles Moore has odds of 11,898 to one in favor of being the biological father of [the child]. This is a probability of paternity of 99.99%."

The trial court found that the defendant was the natural father of the child and fixed the child support at $75 per month commencing April 1, 1986, and increasing to $125 per month on June 1, 1986, and continuing until the child reaches the age of 19, marries, dies, or becomes self-supporting, or until further order of the court.

The defendant has appealed and contends that the trial court erred in refusing to appoint counsel for the defendant and in ordering child support in the amount of $125 per month.

The principal issue is whether an indigent person who is alleged to be the father of a child is entitled to the appointment of counsel in a paternity proceeding. Nebraska has no statute providing for the appointment of counsel under those circumstances. The defendant contends that the due process clauses of the Constitutions of the United States and this state require that he be furnished counsel.

In *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), the mother of an illegitimate child who was a recipient of public assistance alleged that the defendant was the father of the child. The mother was provided with counsel by the state in order to initiate the paternity suit. The defendant's counsel was furnished by a legal aid group for the purpose of requesting that the trial court order blood grouping tests. A state statute then in effect provided that the costs of blood tests were chargeable to the moving party. The defendant asserted indigency and asked the state to subsidize the costs of the tests. The trial court denied the defendant's motion, and no tests were performed. The defendant was subsequently found to be the child's father and ordered to pay support. The appellate court affirmed the denial of the defendant's motion, finding that neither due process nor equal protection rights had been violated in denying the defendant's motion.

On certiorari to the U.S. Supreme Court, the defendant contended that his due process rights were violated when the state refused to pay for blood grouping tests requested by an indigent. The court, citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), stated that " 'due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through

the judicial process must be given a *meaningful opportunity to be heard*.' " (Emphasis supplied.) 452 U.S. at 5-6.

In determining whether or not an indigent paternity defendant's opportunity to be heard would be rendered "meaningless" by the denial of blood testing at the state's expense, the Court noted that "[s]ince millions of men belong to the possible groups and types, a blood grouping test cannot conclusively establish paternity. However, it can demonstrate nonpaternity . . . . It is a negative rather than an affirmative test with the potential to scientifically exclude the paternity of a falsely accused putative father." 452 U.S. at 7. The Court recognized a 1976 joint report of the American Bar Association (ABA) and the American Medical Association (AMA) which confirmed the fact that blood grouping tests were available to exonerate innocent putative fathers. The ABA-AMA report recommended use of the "seven blood test 'systems'—ABO, Rh, MNSs, Kell, Duffy, Kidd, and HLA." 452 U.S. at 8. These systems were found to be " 'reasonable' in cost and to provide a 91% cumulative probability of negating paternity for erroneously accused negro men and 93% for white men." *Id.* The Court, citing Justice Brennan in *Cortese v. Cortese*, 10 N.J. Super. 152, 76 A.2d 717 (1950), wrote:

> "[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.
>
> "The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day. Their reliability as an indicator of the truth has been fully established. The substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but 'they can disprove it conclusively in a great many cases provided they are administered by specially qualified experts' . . . ."

452 U.S. at 8.

In deciding the process which was constitutionally due the defendant, the Court considered the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976): (1) the private interests at stake; (2) the risk of erroneous results under current procedures, considered with the probable value of the suggested procedural safeguard; and (3) the governmental interests at stake.

The Court found that putative fathers' private interests in paternity proceedings were "substantial," 452 U.S. at 13, and included pecuniary interests (in avoiding support obligations), liberty interests (threatened by noncompliance with support orders), and interests relating generally to the creation of a parent-child relationship. "Just as the termination of such bonds demands procedural fairness, . . . so too does their imposition. . . . [B]oth the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination." *Little v. Streater*, 452 U.S. 1, 13, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981).

The Court's conclusion that erroneous results are possible without the aid of blood testing is reflected in the following passage:

> Given the usual absence of witnesses, the self-interest coloring the testimony of the litigants, and the State's onerous evidentiary rule and refusal to pay for blood grouping tests, the risk is not inconsiderable that an indigent defendant in a Connecticut paternity proceeding will be erroneously adjudged the father of the child in question. . . . Further, because of its recognized capacity to definitively exclude a high percentage of falsely accused putative fathers, the availability of scientific blood test evidence clearly would be a valuable procedural safeguard in such cases. . . . Unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute. Thus, access to blood grouping tests for indigent defendants such as appellant would help to insure the correctness of paternity decisions in Connecticut.

(Citations omitted.) 452 U.S. at 14.

Finally, the governmental interests were found to be "legitimate" but " 'hardly significant enough to overcome private interests as important as those here.' " *Id.* at 16, citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

Following the analysis of the *Eldridge* factors, the Court held that the denial of the aid of a blood test to indigent defendants in state-initiated paternity suits resulted in the denial of a " 'meaningful opportunity to be heard,' " and thus the due process requirement of fundamental fairness was violated. 452 U.S. at 16.

While *Little* did not address the issue of appointed counsel for indigent defendants in paternity suits, it demonstrated the magnitude of what is involved in a determination of paternity. One of the more important statements of the Court was the apparent approval of the ABA-AMA report. Thus, an indigent defendant on whom blood tests are to be performed is initially entitled to a group of tests known as the RCA tests, which include ABO, Rh, and MNS. If these tests do not *exclude* the defendant as the father, the Kell, Kidd, and Duffy systems, three additional RCA tests, should then be performed. If again paternity is not excluded, an HLA test should be conducted. It has been reported that the RCA tests (Rh, ABO, MNS, Kidd, Duffy, and Kell) will exclude no more than 65 to 70 percent of men who are not the biological father, but the HLA test *alone* will exclude over 90 percent of putative fathers. Roberts, *Establishing a Family: Blood Tests and the Paternity Determination Process*, 18 Clearinghouse Rev. 1290 (1985). The article stressed that

> [b]ecause of the quasi-criminal nature of most paternity proceedings and/or the potential res judicata effect of the judgment in subsequent criminal proceedings, these cases undoubtedly require that the HLA test as well as the RCAs be provided. To hold otherwise would allow those with ad-

> equate resources the opportunity to use tests guaranteed to exclude over 90 percent of the wrongly accused, while the indigent would have access to tests that exclude only 65 percent of the falsely named. This 25 percent or more disparity is of constitutional dimension.

Id. at 1295.

An additional study demonstrated that with use of the seven-system approach suggested by the ABA-AMA report, the cumulative chance of exclusion for a falsely accused man would be 90 to 95 percent. In other words, this seven-tier testing system should exclude the innocent man 90 to 95 percent of the time and may wrongly include the innocent man as the biological father 5 to 10 percent of the time. Boonlayangoor, Telischi & Paulsen, *Paternity Blood Testing: Analysis, Interpretation and Selection of a Program to Verify Parentage*, 75 Ill. B.J. 278 (1987). "The *critical factor* influencing the power of these tests is the *number of* systems used." *Id.* at 281. The more systems that are included in the testing program the higher is the likelihood of excluding nonfathers and including the true father. The article cited a study which analyzed the results of paternity tests conducted at Cook County Laboratory, where it was found that by using RCA testing only—ABO, Rh, MNSs, Kell, Duffy, and Kidd, "the number of men wrongly identified as being the father could be as high as 37 percent." *Id.*

It has been recognized that the scientific value of blood testing results is dependent on the skills of the individual administering the test as well as on the numerous procedural safeguards that must be observed.

The discussion in *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), demonstrates the importance of the assistance of counsel to defendants in paternity cases. Counsel would function to (1) inform the defendant of the availability of the testing; (2) ensure that both the RCA and HLA tests were performed; (3) analyze the conditions under which the tests were performed; and (4) arrange for

an expert to testify as to the test results and any other relevant information.

The record in this case is not clear as to whether the type of blood testing required under the ABA-AMA model was performed. The report which was received in evidence shows that ABO, Rh, MNS, Kell, and Fy tests were performed. The report does not show whether an HLA test was done. If only RCA tests are performed, counsel representing a putative father might be able to challenge the accuracy of the tests.

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), decided the same day as the *Little* case, the U.S. Supreme Court held that the right of an indigent parent to appointed counsel in child termination proceedings should be decided on a case-by-case basis.

In the *Lassiter* case, the indigent mother, who was serving a sentence for second degree murder, apparently did not allege indigency or request the appointment of counsel. Her rights were terminated, and on appeal to the North Carolina Court of Appeals, she claimed indigency and that the due process clause required court-appointed counsel. The appeals court denied her claim, and the North Carolina Supreme Court in turn denied review.

Although *Lassiter* involved the issue of court-appointed counsel in a context other than paternity, the decision has some application to the facts in this case.

The *Lassiter* Court reviewed various contexts in which the right to appointed counsel issue had been recognized: (1) *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), held that counsel is required before indigent defendants may be sentenced to prison, even if the crime is petty and the term is brief.

(2) *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), held that in delinquency proceedings where

commitment to an institution may result, the juvenile has a right to appointed counsel despite the civil, not criminal, nature of the proceedings.

(3) *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), held that the appointment of counsel for indigent probationers at a probation revocation hearing must be determined on a case-by-case basis.

(4) *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), held that actual imprisonment differs from the threat of imprisonment, and thus actual imprisonment is the requirement for finding a constitutional right to counsel.

The Court then stated that

> [i]n sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

452 U.S. at 26-27.

The Court, basically, promulgated a test to be used in resolving due process claims regarding the right to court-appointed counsel. Focusing on the three *Eldridge* factors—private interests, governmental interests, and risk of error—the Court wrote:

> The dispositive question . . . is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status.

452 U.S. at 31.

The Court found that a parent's private interests in a termination proceeding are "commanding" and that the risk of an erroneous determination is a possibility:

> [T]he ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation.

Lassiter v. Department of Social Services, 452 U.S. 18, 30, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

In evaluating the state's interests, the Court reasoned that

> [i]f, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal . . . .
>
> . . . [T]hough the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the "potential costs of appointed counsel in termination proceedings . . . is [*sic*] admittedly *de minimis* compared to the costs in all criminal actions."

452 U.S. at 28.

Beginning with the presumption that the petitioner was not entitled to court-appointed counsel (because she was not faced with even a potential liberty deprivation should her parental rights be terminated), the Court then balanced the *Eldridge* factors against this presumption and found that the decision as to whether due process required the appointment of counsel for indigent parents in a termination

proceeding was a decision best left to the trial court, subject to appellate review.

From the *Lassiter* case and from *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), it is apparent that under federal due process, the right of an indigent to court-appointed counsel may be found in *either* a civil or criminal context. If a State's paternity process could directly lead to incarceration, *Lassiter* would provide an absolute right to appointed counsel. On the other hand, if incarceration is an indirect consequence, or only a possibility, the *Eldridge* balancing factors must be invoked and balanced against the presumption that counsel will not automatically be appointed if incarceration if not an immediate threat. *Little* seems to hold that the mere *possibility* of incarceration following a paternity determination weighs heavily in favor of appointing counsel.

Numerous state courts have confronted the specific issue of court-appointed counsel for indigent paternity defendants, the majority basing their holdings on principles enunciated in the *Little* and *Lassiter* decisions.

In *Kennedy v. Wood*, 439 N.E.2d 1367 (Inc. App. 1982), the mother, while receiving welfare benefits, commenced an action to have the defendant declared the father of her child born out of wedlock. The plaintiff was represented by the deputy prosecuting attorney, and the indigent defendant appeared pro se. The lower court, finding paternity actions civil in nature, held that no direct deprivation of the defendant's liberty was involved should he be found to be the father of the child, thus leading to the presumption that paternity defendants have no automatic right to court-appointed counsel. The *Eldridge* factors were balanced against this presumption, and as a result, the court held the due process clause demands not only the appointment of counsel for *all* indigent paternity defendants, but also that "[b]ecause this right would be meaningless if such a defendant did not know of the right, we further hold that the court

must advise the paternity defendant in this situation of his right to appointed counsel if he is indigent." 439 N.E.2d at 1372-73.

In the analysis of the *Eldridge* factors, the court focused primarily on the possibility of error should a defendant proceed without counsel. It noted:

> The legislature has recognized the complexity of these proceedings and the importance of their outcome to the State and has afforded the mother and child the assistance of counsel in prosecuting their claim. However, by intervening heavily on behalf of one side, the State has upset the balance of a traditionally private dispute. The chances that the significant consequences of fatherhood will be imposed on the incorrect man dramatically increase if, because he is unable to afford counsel, he offers a legally inept or no defense. . . .
>
> The fact-sensitive nature of the paternity proceedings and the importance of blood tests further demonstrate the necessity for the timely assistance of counsel to ensure that the putative father is apprised of his right to request blood tests and to inform him of their significance. The value of blood tests in exonerating innocent putative fathers has been recognized.

(Citations omitted.) *Id.* at 1371, citing *Little* as well as the joint report of the ABA-AMA recommending the series of seven tests in determining the probability of paternity. The court concluded, stating,

> An indigent defendant's right to a free blood grouping test may be rendered meaningless without counsel to advise him of the right to demand such a test, to explain its significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence.

439 N.E.2d at 1372.

In *Corra v. Coll*, 305 Pa. Super. 179, 451 A.2d 480 (1982), the defendant, who was named as the putative father of a child born out of wedlock, claimed indigency and sought court-appointed counsel under the federal due pro-

cess clause. Unlike the court in *Kennedy*, the Pennsylvania court found that despite the civil nature of paternity suits, the threat of future imprisonment (based on a determination of paternity at an earlier proceeding) was significant and was a strong factor in the determination that court-appointed counsel is necessary. The court stated:

> It is our belief that the creation of a parent-child relationship is an example of the type of situation which demands a flexible application of due process. Accordingly, we analyze the due process requirements of *Mathews v. Eldridge* against a strong presumption that court-appointed counsel is constitutionally required for indigent defendants in a paternity proceeding.

451 A.2d at 485. The court also recognized that

> [o]nce paternity is established, that finding is *res judicata* and cannot be relitigated in a subsequent proceeding. . . . Consequently, denial of court-appointed counsel at the initial paternity proceeding may result in defendants being sent to jail without ever having had a meaningful opportunity to be heard on the issue of their paternity.

451 A.2d at 486.

As in *Kennedy*, the *Coll* court noted that because a complainant in a support action, upon request, is entitled to representation by the district attorney, the defendant's need for counsel is readily apparent.

> A paternity proceeding often becomes an adversary contest between a complainant, backed by the resources of a skilled attorney, and the uncounselled accused father. Under these circumstances, the contest is undeniably tilted in favor of the complainant. Since many indigent defendants may be illiterate and unfamiliar with courtroom procedure, that imbalance is exacerbated yet further.

451 A.2d at 487.

The court's analysis of the defendant's private interests resulted in the finding that the creation of a parent-child relationship and the threat to the defendant's liberty interests should he be found to be the father and ordered to pay

support, as well as the potential financial impact on the defendant, were very significant. In noting the potential for erroneous results should the defendant be denied counsel, the court found that the defendant's *access* to free blood testing was not enough and that " 'the importance of blood tests magnifies the necessity for the timely assistance of counsel, to ensure that the defendant is apprised of his right to request blood tests and to inform him of their significance.' " 451 A.2d at 486, citing *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979).

The court held the following in regard to the governmental interests at stake:

> Thus, not only the defendant's interest but also the state's interest is best served by a hearing at which a defendant accused of parentage is represented by an attorney. It is furthermore clear that the state's future administrative burdens would be lessened since a correct determination of paternity increases the chance that the adjudged parent will comply with support obligations. Accordingly, while the state will incur the added expense of providing indigents with court-appointed counsel, this expense is outweighed by the salutary aspects of having counsel present at the paternity proceeding.

451 A.2d at 488.

Finally, the court held:

> There is no situation of more monumental importance, or more worthy of due process protection, than the creation of a parent-child relationship. In recognition of this, the legislature has conferred legal representation on a complainant upon the request of the court, or a Commonwealth or local public welfare official. We find no reason why an indigent defendant, accused of parentage, should not also be provided with the assistance of experienced counsel.

Id.

In *State, ex rel., v. Toner*, 8 Ohio St. 3d 22, 456 N.E.2d 813 (1983), the mother, an AFDC recipient, had filed a

complaint alleging the defendant was the father of her child. The defendant, an indigent, moved that the lower court appoint counsel, and was denied. The defendant then obtained the services of the American Civil Liberties Union for the sole purpose of asserting his constitutional right to court-appointed counsel. The court, deciding on state and federal due process grounds, found that any indigent paternity defendant facing the State as an adversary must be afforded court-appointed counsel.

In considering the *Eldridge* factors, the court found the private interests to be "substantial" and the state's financial interests as "hardly significant enough to overcome the private interests involved." 8 Ohio St. 3d at 24, 456 N.E.2d at 815. The risk of error concerned the court, as it stated:

> Given the value of the right to blood grouping tests . . . which right could feasibly go unasserted by one unfamiliar with the law, and the likelihood that expert witnesses will be called to testify should blood grouping tests be ordered . . . it appears that one unknowledgeable of his rights and unskilled in the art of advocacy could easily go astray in conducting his defense. It can only be assumed that court-appointed counsel would provide adequate protection against these dangers.

Id. Finally, the court held that

> these substantial interests and the integrity of the paternity determination itself could easily be damaged if the appellant herein were to be denied counsel during the proceedings. Emphasizing the fact that the paternity case below was initiated at the state's insistence and prosecuted at the state's expense, we realize that appellant is presented with a formidable task if he should be required to defend himself.

8 Ohio St. 3d at 23, 456 N.E.2d at 814-15. See, also, *Keeney v. Lawson*, 19 Ohio App. 3d 318, 484 N.E.2d 745 (1984), where the court found an indigent paternity defendant constitutionally entitled to state-funded blood testing and counsel, and also found that the rule should be applied retroactively.

In *Lavertue v. Niman*, 196 Conn. 403, 493 A.2d 213 (1985), a mother, assisted by the state, brought an action against a putative father to establish paternity. The defendant claimed indigency and unsuccessfully moved for appointment of counsel. The defendant, found guilty and ordered to pay support, appealed the decision, arguing the state and federal due process clauses constitutionally mandated the appointment of counsel. The court, citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), stated:

> The test that governs the due process right to court-appointed counsel is whether the absence of counsel deprives an indigent defendant of " 'fundamental fairness.' " . . . That test, in turn, involves an analysis of three separate factors: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."

196 Conn. at 407-08, 493 A.2d at 216.

The court identified private interests of both the putative father and the child, finding that the defendant has a potential loss of liberty if found guilty and later defaults on child support. Both the defendant and the child were found to have significant financial and proprietary interests. The state's interests were found to be conflicting—acting as parens patriae in protecting the child's welfare in assuring that an accurate result is reached, countered with an economic focus toward minimizing costs and time in resolving paternity suits. The state argued that the risk of error was inconsequential should indigent defendants be denied counsel because all defendants have access to blood testing information. The court, unpersuaded by the argument, wrote, "The use of scientific evidence itself may contribute to the risk of error because it increases the complexity of the litigation. The state's provision of counsel for the mother is, in part, a recognition of this fact." *Id.* at 410, 493 A.2d at

218. In summary, the court found the role of attorneys in paternity proceedings to be multifaceted:

> Counsel would alert the defendant of his right to have blood tests performed, advise him about the kinds of tests available and inform him of the procedures that must be followed to obtain accurate results. Counsel would also be able to challenge test results submitted by the state. An attorney would develop defenses independent of the blood test evidence, such as lack of access to the mother or the existence of another potential father. . . . An attorney would conduct discovery, counsel the defendant on the possibility of reaching a pretrial settlement, subpoena witnesses and conduct cross-examination. The record in this case discloses the likelihood that a pro se defendant's own inartful questioning and failure to obtain witnesses will substantially impair the truth-finding function of the trial court.

Id. at 411, 493 A.2d at 218.

Although all of the cases are not in agreement, we believe the better rule is that due process requires that an indigent defendant in a paternity proceeding be furnished appointed counsel at public expense.

Since the plaintiff in this case was not a recipient of public assistance, the state did not *initiate* her paternity action. However, the plaintiff filed her claim pursuant to § 43-512.02, which provides:

> (1) Any child, or any relative of such a child, may file with the county attorney, . . . county welfare office, or other county office designated by the Department of Social Services an application for the same child support collection or paternity determination services as are provided to dependent children and their relatives under sections 43-512 to 43-512.10 by the Department of Social Services, the county attorney, and the clerk of the district court.

As a result, the plaintiff was assisted by the Lancaster County attorney's office in prosecuting her claim. Thus, the fact that the state did not *initiate* the suit is irrelevant.

The state's involvement on behalf of the plaintiff is obvious throughout the course of the proceedings.

Although Nebraska statutes provide that paternity actions are civil in nature, Neb. Rev. Stat. § 13-111 (Reissue 1983), they have been described as "penal in some aspects." *Lockman v. Fulton*, 162 Neb. 439, 443, 76 N.W.2d 452, 455 (1956).

Even though a defendant's physical liberty is not *immediately* at risk if adjudged to be the father of a child in a paternity proceeding, he can lose his physical liberty in *later* proceedings which arise out of and are based on the initial paternity determination. Criminal sanctions for nonsupport can attach to "[a]ny person who intentionally fails, refuses, or neglects to provide proper support which he knows or reasonably should know he is legally obliged to provide to a . . . minor child . . . ." Neb. Rev. Stat. § 28-706(1) (Reissue 1985).

Furthermore, Neb. Rev. Stat. § 43-1406 (Reissue 1984) provides that in a child support proceeding, a father may be held liable for support, and "Failure on the part of the father to perform the terms of such decree shall constitute contempt of court and may be dealt with in the same manner as other contempts." As a result, the defendant may be subject to being fined or imprisoned. Neb. Rev. Stat. § 25-2121 (Reissue 1985).

In addition to a potential threat of imprisonment, a determination of paternity in a state-initiated paternity suit would be res judicata and therefore not open to attack in a later proceeding involving collateral issues such as nonpayment of support. A final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985).

The threat of future incarceration resulting from a finding of paternity is significant in determining the need for counsel. The paternity suit is the only opportunity for the putative father to be heard on the issue. The future threat to the defendant's liberty is significant.

The risk of error should indigent paternity defendants go unrepresented is apparent. Counsel is necessary to inform the defendant of his right to a jury trial, as well as his right to blood testing. Beyond this point, the need for counsel escalates. The assistance of counsel is necessary to assist the defendant in presenting his case by taking pretrial depositions; retaining witnesses, both expert and lay; conducting the defendant's case at trial through direct and cross-examination of witnesses; establishing defenses; and so on. The risk of a one-sided trial where the plaintiff is assisted by counsel highly specialized in the area is undeniable.

The interest of the state is primarily pecuniary and of less import than the overriding interest of *all* parties, including the state, for an accurate and fundamentally fair determination of paternity.

We conclude that due process requires that an indigent defendant has an absolute right to court-appointed counsel in state-initiated paternity proceedings. The concepts of "fundamental fairness" and "meaningful opportunity to be heard" which are integral to the notion of due process make the right to counsel mandatory.

It is unnecessary to consider the other assignment of error.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

OFFICE OF THE CLERK OF THE
SUPREME COURT

LINCOLN, NE 68509 *7-21-88*

IN CASE OF

CARROLL v. MOORE, NO. 86-375

THE FOLLOWING ORDERS HAVE BEEN MADE:

Motion of appellee for rehearing overruled

Respectfully,

CLERK OF THE SUPREME COURT

386-210
ANSWER

APRIL 22, 1985
Lincoln, Neb

To the Court

In regard to the Court Summon Number 386-210 I'm enclosing my reply.

Sincerely,

/s/ EDWIN CHARLES MOORE

PATERNITY LAWSUITS AFFECT TAXPAYERS

By Bill Kreifel
Journal Writer

Two Lancaster County lawsuits affecting the financial burden to be borne by taxpayers in cases of aid to dependent children are pending in the Nebraska Supreme Court.

One centers on the state's four-year statute of limitations for bringing paternity actions to obtain support payments from the child's natural father.

The other deals with the question of whether an indigent defendant in a state-instituted paternity suit to recover such payments has the right to court-appointed counsel at public expense.

Bigger Bill

Deputy Lancaster County Attorney Joe Kelly says that allowing the latter situation to exist could create a bigger bill for taxpayers than if the four-year time limit is permitted to stand.

Kelly serves as co-counsel with Lincoln lawyer Gary Pearson in the statute of limitations challenge, and as principal counsel in the suit questioning the right of indigent paternity defendants to a publicly paid lawyer.

The statute of limitations is being attacked on constitutional grounds in a case involving a Lincoln woman who brought a paternity action against the alleged natural father of her child nine years after the child was born.

The Supreme Court brief filled by Pearson and Kelly says that the results of a blood test indicated a 97.252 percent likelihood that the defendant was the father, but Lancaster County District Judge Dale Fahrnbruch ruled that the woman was barred from bringing the action by the statutory time restriction.

Decisions cited

However, Pearson and Kelly argue that constitutional requirements of equal protection for support should apply to both legitimate and illegitimate children, and they cite past decisions in other states plus two U.S. Supreme Court decisions in cases from Texas and Tennessee to back up their claim.

The Texas case was decided last year when the nation's high court declared that a one-year time limit for paternity suits in that state was unconstitutional. The court didn't specify what time period, if any, would be appropriate, but said that it must be long enough to permit those who have an interest in the child to bring such an action in the youngest's behalf despite the difficult personal, family and financial circumstances that often surround the birth of a child out of wedlock.

The Tennessee case was decided in June when the U.S. Supreme Court said that state's two-year limitation on paternity cases violated constitutional safeguards. But again, the justices refrained from saying what length of time would be proper.

Unconstitutional

Subsequently, Pearson and Kelly say New York has held that its two-year statute of limitations was unconstitutional and Oregon struck down its six-year time limit.

The Nebraska Supreme Court case dealing with the appointment of publicly paid attorneys for indigent defendants in state-instituted paternity actions involves a Lancaster County man who is alleged to be the natural father of a Lincoln woman's 2-year-old son.

The man's court-appointed lawyer, Dick H. Hartsock of Lincoln, says in his high court brief that such paternity defendants have a constitutional due process right to free legal

representation, and that the supreme courts of six other states have so held. They are Alaska, North Carolina, West Virginia, Minnesota, Michigan and California.

The West Virginia Supreme Court, according to Hartsock, noted that such actions can be brought by a county prosecutor, and if the defendant is found to be the father, he would be required to support the child and could be jailed for failing to do so.

However, Kelly notes the Iowa and Washington supreme courts and a Ohio Court of Appeals have ruled to the contrary, and that the U.S. Supreme Court has held that the constitution requires only that no indigent criminal defendant be sentenced to imprisonment unless the state has afforded him the right to court-appointed counsel.

Iowa decision

Kelly notes that the Iowa Supreme Court said that an indigent charged with contempt of court for nonpayment of child support would have a right to counsel at the hearing which could result in his incarceration. But at the paternity hearing where his responsibility for making such payments is established, "his liberty is not immediately involved," and lawyer representation isn't required, the Iowa court ruled.

The Iowa court said if it were that would "inevitably lead to a requirement of court-appointed counsel for indigent defendants in other actions which might one day form the basis of a contempt proceeding."

8-19-85	McGinn.	Defendant present pro se. Dept. Co. Atty. Laurie Campbell present. Court advises defendant that defendant is not entitled to appointment of counsel in this case. Defendant's answer is construed to be a general denial. Defendant agrees that blood test of defendant in case found at Doc. 383 Page 197 can be used in this case and the Court therefore vacates its order of 7-5-85.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MARCIA LEE CARROLL,	)	Docket 386 Page 210
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
EDWIN CHARLES MOORE,	)	
	)	
Defendant.	)	

THIS MATTER came on for hearing on the 26th day of March, 1986, upon the Motion of the plaintiff. The plaintiff was represented in Court by Janice Lipovsky, Deputy Lancaster County Attorney. The defendant was present in Court. Evidence was submitted to the Court, and in consideration thereof, the Court FINDS, ORDERS, ADJUDGES AND DECREES:

1. The Court has jurisdiction over the defendant and the subject matter.

2. The plaintiff is the mother of and the defendant is the natural father of:

MARIAH CELESTE CARROLL d/o/b 6-24-82.

3. The defendant has a duty to support the above child.

4. The defendant is hereby ordered to pay $75.00 per month for the current support of the above child, due on the first day of April, 1986 and the first day of May, 1986. The defendant's child support obligation will automatically increase to $125.00 per month commencing the first day of June, 1986, and continuing on the first day of each month thereafter until the child reaches the age of nineteen, marries, dies, becomes self-supporting, joins the service, or until further order of court.

5. In the event the defendant fails to pay any such child support payment, as such failure is certified each month by the Clerk of the District Court in cases where court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, he shall be subject to income withholding and may be required to appear in Court on a date to be determined by the Court and show cause why such payment was not made. In the event that the defendant fails to pay and appear as ordered, a warrant shall be issued for his arrest.

6. The defendant is ordered to pay all court costs incurred herein.

7. The Clerk of the District Court is directed to send the current monthly child support obligation to the plaintiff at her last known address.

8. All of said payments for child support and costs are to be made by the defendant to the Clerk of the District Court for Lancaster County, Nebraska, County-City Building, 555 South 10th Street, Lincoln, Nebraska, 68508-2871, under Docket 386, Page 210, until further order of court.

9. The parties to this action ordered to pay a judgment as part of the proceedings are hereby required to furnish to the Clerk of the District Court of Lancaster County, Nebraska, the name of his or her employer, and any other information the Court shall deem relevant until such judgment shall be paid in full. The parties are also required to advise the Clerk of any changes in such information between the time of entry of this decree and the payment of the judgment in full. Failure to comply with this section shall be punishable by contempt.

DATED this 2nd day of April, 1986.

/s/ BERNARD J. McGINN
DISTRICT COURT JUDGE

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

MARCIA LEE CARROLL,	)	Docket No. 86-375
	)	
Plaintiff-Appellee,	)	PREHEARING
	)	CONFERENCE
vs.	)	STATEMENT
	)	
EDWIN CHARLES MOORE,	)	
	)	
Defendant-Appellant.	)	

COURT OR AGENCY FROM WHICH APPEAL TAKEN:

District Court of Lancaster County, Nebraska

TRIAL COURT NO: 386/210

DATE OF JUDGMENT OR ORDER: August 19, 1985 and April 2, 1986

DATE NOTICE OF APPEAL FILED: May 1, 1986

NAME, ADDRESS AND TELEPHONE NUMBER OF ATTORNEYS FOR ALL PARTIES:

Attorney for Appellant: Roberta S. Stick
825 Terminal Building
Lincoln, NE 68508
435-2161

Attorney for Appellee: Janice Lipovsky
555 South 10th Street
Lincoln, NE 68508
471-7609

DESCRIBE NATURE OF LITIGATION:

Action brought by the County Attorney of Lancaster County on behalf of a mother of a child born out-of-wedlock to establish paternity and get an Order of child support.

DESCRIBE BRIEFLY THE CLAIMS, DEFENSE AND ISSUES LITIGATED AND RESULTS OBTAINED:

An action was brought by the County Attorney to establish paternity of a child born out-of-wedlock and to order the Defendant to pay child support. The court found the Defendant to be the father and ordered him to pay child support. The court prior to trial on the matter informed the Defendant of his right to ask for appointment of an attorney at County expense. The Defendant requested this and the court denied this request and stated a change in its position that the Defendant was entitled to appointment of counsel.

DESCRIBE NATURE OF JUDGMENT OR ORDER AS TO WHICH REVIEW IS SOUGHT IF A FORMAL ORDER OR JUDGMENT WAS ENTERED, ATTACH COPY.

On August 19, 1985, an entry appears on the Judge's sheet finding that the Defendant was not entitled to appointment of counsel. On April 2, 1986, an Order was entered finding that the Defendant was the father of Mariah Celeste Carroll and directing him to pay child support and all court costs.
(A copy is attached).

ISSUES PROPOSED TO BE RAISED ON APPEAL:

1. Whether the Defendant, an indigent, was entitled to be provided with counsel at State expense in a suit brought by the State to determine whether he was the father of a child born out-of-wedlock and whether he should be required to pay child support.
2. If the Court were to determine that the Defendant were not entitled to court-appointed counsel and a judgment of the District Court as to paternity were to remain unchanged, whether there was sufficient

evidence to justify the award of support entered against the Defendant.

BRIEFLY DESCRIBE THE BASIS UPON WHICH YOU BELIEVE THE APPEAL IS MERITORIOUS:

Various state courts that have dealt with the issue of whether an indigent Defendant is entitled to appointment of counsel at State expense in a suit brought by the State to determine paternity have held that defendants are constitutionally entitled to court-appointed counsel.

State ex rel. Cody v. Toner, 8 Ohio St.3d 22 (1983);
Corra v. Coll, 451 A.2d 480 (Pa. Super. Ct. 1982);
Kennedy v. Wood, 439 N.E.2d 1367 (Ind. Ct. App. 1982);
State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (W.Va. 1980);
Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979);
Salas v. Cortez, 593 P.2d 226 (Cal. 1979);
Reynolds v. Kimmons, 569 P.2d 799 (Alaska 1977);
Artibee v. Cheboygan Circuit Judge, 243 N.W.2d 248 (Mich. 1976);
Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

SET OUT REASONS WHY YOU BELIEVE THIS MATTER SHOULD NOT BE DISPOSED OF PURSUANT TO RULE 7 OF THIS COURT:

This is a case of first impression in the State of Nebraska and the constitutional issues raised merit oral argument.

EDWIN CHARLES MOORE,
Appellant.
BY: */s/ ROBERTA S. STICK*
ROBERTA S. STICK
825 Terminal Building
Lincoln, NE 68508
435-2161

CERTIFICATE OF SERVICE

On the 9th day of May, 1986, a copy of the foregoing was mailed by U.S. mail, postage prepaid, to Janice Lipovsky, 555 South 10th Street, Lincoln, NE 68508.

/s/ ROBERTA S. STICK
ROBERTA S. STICK

ORIGINAL

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MARCIA LEE CARROLL, Petitioner, v. EDWIN CHARLES MOORE, Respondent.	)	No. 88-786 MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, EDWIN CHARLES MOORE, through his attorney, asks leave to proceed in forma pauperis and to file the attached Brief in Opposition to Petition for a Writ of Certiorari accordingly. The Respondent has previously been granted leave to so proceed in the Nebraska Supreme Court. The Respondent's attorney's Affidavit in support of this motion is attached hereto and incorporated herein by this reference.

EDWIN CHARLES MOORE,
Respondent

BY: Roberta S. Stick

ROBERTA S. STICK, of
LEGAL SERVICES OF SOUTHEAST NEBRASKA
Attorney for Respondent
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161

IN THE SUPREME COURT OF THE UNITED STATES

MARCIA LEE CARROLL,	)	No. 88-786
	)	
Petitioner,	)	
	)	
v.	)	AFFIDAVIT
	)	
EDWIN CHARLES MOORE,	)	
	)	
Respondent.	)	

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

ROBERTA S. STICK, being first duly sworn, deposes and states:

1. She is the attorney who represented EDWIN CHARLES MOORE in the appeal he took to the Nebraska Supreme Court from the judgment of the District Court of Lancaster County, Nebraska, at Docket 386, Page 210.

2. She is desirous of representing Respondent's interest regarding the Petition for Writ of Certiorari that has beeen filed in the matter herein.

3. The appeal referred to in Paragraph 1 herein was taken In Forma Pauperis.

4. A copy of the affidavit used to support the Motion to Proceed In Forma Pauperis is attached hereto, marked Exhibit 1, and incorporated herein by this reference.

5. She has had no contact with EDWIN CHARLES MOORE for the last year and an attempt to contact him at an address furnished to her by the Lancaster County Attorney's office was unsuccessful.

6. Although she has had no contact with EDWIN CHARLES MOORE regarding the Petition for Writ of Certiorari that has been filed herein, she believes EDWIN CHARLES MOORE would be desirous of her continuing to represent his interests.

7. She has no reason to believe that EDWIN CHARLES MOORE's financial situation at this time is any different than it was at the time he signed the Affidavit attached hereto.

Roberta S. Stick
ROBERTA S. STICK

SUBSCRIBED and SWORN to before me on this 7th day of December, 1988.

KAREN L. PICKETT
GENERAL NOTARIAL SEAL
STATE OF NEBRASKA
COMMISSION EXPIRES
OCT. 14, 1992

Karen L Pickett
Notary Public

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MARCIA LEE CARROLL, Plaintiff, vs. EDWIN CHARLES MOORE, Defendant.	) Docket 386	Page 210
	AFFIDAVIT	

STATE OF NEBRASKA)
)ss.
COUNTY OF LANCASTER)

EDWIN CHARLES MOORE, being upon oath first duly sworn, deposes and states:

1. That he is the Defendant in the above-entitled action for establishment of paternity.

2. That this Affidavit is made pursuant to Neb. Rev. Stat. §25-2301, et seq.

3. That because of his poverty, Defendant is unable to prepay the costs of filing an appeal of the decision in this matter to the Nebraska Supreme Court.

4. That Defendant's current assets consist of:

Cash	0
Checking account	None
Savings account	$3.00
Stocks or bonds	None
Real property	None
Personal property (clothing)	$100.00
Automobile (1972 Oldsmobile)	200.00

Exhibit 1

5. That he was unemployed from November, 1985 through April 28, 1986 when he became employed as a construction worker. He will earn $5.00 an hour and will work approximately 20 hours per week. While unemployed he resided with friends and relied upon them for his support. Since obtaining employment, he will pay 1/2 of the monthly rent at the residence where he resides or approximately $178.00 plus 1/2 of the utilities and food costs which will amount to approximately $100.00. In addition he is indebted to the Lincoln Clinic in the amount of approximately $300; Lincoln General Hospital in the amount of approximately $100 and owes Cengas over $200 for past-due bills which he will being paying on after he receives his first paycheck. in May, 1986.

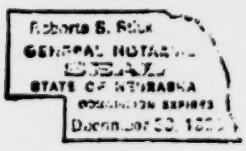
6. That he receives no other welfare or financial assistance.

THEREFORE, because of his poverty, he believes he is entitled to the redress sought and should be allowed to pursue his appeal in forma pauperis.

April 30 1986
Date

EDWIN CHARLES MOORE

SUBSCRIBED & SWORN to before me this 30th day of April, 1986.



Notary Public

IN THE SUPREME COURT OF THE UNITED STATES

MARCIA LEE CARROLL,	)	No. 88-786
Petitioner,	)	
v.	)	CERTIFICATE OF SERVICE
EDWIN CHARLES MOORE,	)	
Respondent.	)	

The undersigned hereby certifies that on the 5th day of December, 1988, one copy of Respondent's Brief in Opposition to Petition for Writ of Certiorari was served on Petitioner's counsel of record by mailing a copy, United States mail, postage prepaid, to Michael Thew, Deputy Lancaster County Attorney, County-City Building, 555 South 10th Street, Lincoln, Nebraska, 68508.

Roberta S. Stick

ROBERTA S. STICK, of
LEGAL SERVICES OF SOUTHEAST NEBRASKA
Attorney for Respondent
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161

No. 88-786

In the

Supreme Court of the United States

October Term, 1988

Marcia Lee Carroll,

Petitioner,

v.

Edwin Charles Moore,

Respondent.

On Petition for a Writ of Certiorari

to the Supreme Court of Nebraska

Respondent's Brief in Opposition

Roberta S. Stick, of
Legal Services of Southeast Nebraska
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161
Attorney for Respondent

QUESTIONS PRESENTED FOR REVIEW

Did the Nebraska Supreme Court err in holding that concepts of "fundamental fairness" and "meaningful opportunity to be heard" which are integral to the notion of due process make the right to counsel for indigent defendants in state-initiated paternity proceedings mandatory?

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The Respondent, Edwin Charles Moore, respectfully asks the Court to deny the Petition for Writ of Certiorari in this case, the opinion in which is reported at 228 Neb. 561 (1988).

STATEMENT OF THE CASE

The Respondent appealed to the Nebraska Supreme Court from the Lancaster County District Court order of August 19, 1985, denying his request for court-appointed counsel and the April 2, 1986 order finding paternity and directing payment of child support. Among the propositions of law presented to the Supreme Court by the Respondent were that an indigent defendant in a state-initiated paternity proceeding has a federal and state constitutional due process right to court-appointed counsel. Both Petitioner and Respondent cited to the court all the relevant cases supporting their respective positions regarding the issue of court-appointment of counsel. In a lengthy and well-considered opinion in which it examined case law from other jurisdictions, a unanimous Nebraska Supreme Court agreed with the position propounded by the alleged father. The court relied on general concepts of due process in imposing this obligation on Nebraska state courts, not specifically articulating whether its decision was based on state or federal constitutional grounds.

In reaching its decision, the court also gave consideration to the effect on due process of Nebraska statutes and case law concerning a right to a jury trial in paternity cases, the right to blood testing and the threat of incarceration if a person does not provide child support, when legally obligated to do so. It acknowledged that these all illustrate the need for counsel if the defendant is to have a meaningful opportunity to be heard and if paternity is to be determined in a fundamentally fair manner.

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the decision below does not involve a situation in which a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort.

1. The Nebraska Supreme Court, after an exhaustive review of all relevant authority, in a unanimous decision, chose to impose a burden on Nebraska state courts that is supported by state due process grounds and general concepts of due process as well as being within its supervisory authority.

The court in the case below makes no reference to whether its decision that an indigent defendant in state-initiated paternity proceedings has an absolute right to court-appointed counsel is based on state or federal constitutional grounds. Given this situation, this Court should decline to take jurisdiction. In Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55 (1934), cited in Michigan v. Long, 463 U.S. 1032 (1983), this Court stated:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for a decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it ...[I]f it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction....(citations omitted).

Long considered the issue of whether the Supreme Court should decline to take jurisdiction in a case that is alleged to rest on adequate and independent state grounds, concluding that:

> ...we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

463 U.S. at 1043. In Long the Court was persuaded to accept jurisdiction because the Michigan state court decision presented

for review relied exclusively on its understanding of applicable federal cases. However, in the case below, the Nebraska Supreme Court relied on other state court decisions regarding the issue of appointment of counsel for an indigent defendant in a paternity case in reaching its determination. There are no applicable federal cases. And the Nebraska Supreme Court opinion relies on general concepts of due process in concluding there is a right to court-appointment of counsel.

The state court decisions referred to and cited favorably by the Nebraska Supreme Court were decided on a variety of bases and give no guidance as to the exact principle upon which the opinion in the court below was based. They include Kennedy v. Wood, 439 N.E. 2d 1367 (Ind. App. 1982), in which the Indiana court made reference to the Fourteenth Amendment, but also cited state statutes recognizing the importance of counsel in various situations (such as exist in Nebraska); Corra v. Coll, 305 Pa. Super. 179, 451 A.2d 480 (1982), which relied on the federal due process clause, although referring to Hepfel v. Bashaw, 279 N.W 2d 342 (Minn. 1979), in which the Minnesota Supreme Court declined to decide the issue of appointment of counsel on due process and equal protection grounds, but instead found the right to counsel pursuant to the Court's supervisory power to ensure the fair administration of justice; State ex rel. Cody v. Toner, 8 Ohio St. 3d 22 (1983), in which the court based the right to counsel on state and federal due process grounds; and Lavertue v. Niman, 196 Conn. 403, 493 A.2d 213 (1985), also decided on state and federal due process grounds.

After its examination of these cases, the Nebraska Supreme Court acknowledged the confusion as to the foundation on which the indigent paternity defendant's right to counsel is grounded and affirmed its commitment to appoint counsel for indigent defendants in state-initiated paternity proceedings based on concepts of fundamental fairness or the court's supervisory authority rather than specific federal or state constitutional grounds. The court first stated:

Although all of the cases are not in agreement, we

> believe the better rule is that due process requires that an indigent defendant in a paternity procedure be furnished appointed counsel at public expense.

228 Neb. at 577. It later went on to conclude that:

> The concepts of "fundamental fairness" and "meaningful opportunity to be heard" which are integral to the notion of due process make the right to counsel mandatory .

Id. at 579.

The Nebraska court also had the opportunity to examine an ample body of case law in which state courts have decided that the right to court-appointed counsel for an indigent paternity defendant rests on state due process constitutional grounds. See Toner and Niman, supra. See also State ex rel. Graves v. Daugherty, 266 S.E. 2d 142 (W. Va. 1980); Madeline G. v. David R., 467 N.Y.S. 2d 271 (Fam. Ct. 1979); Salas v. Cortez, 593 P.2d 226 (Cal. 1979); Reynolds v. Kimmons, 569 P. 2d 799 (Alaska 1977); Artibee v. Cheboygan Circuit Judge, 243 N.W. 2d 248 (Mich. 1976). Substantiation for the decision in the case below can rest on the Nebraska Constitution's due process clause, as well as general concepts of due process.

Given the ambiguity surrounding the basis of the Nebraska Supreme Court decision, the exhaustive analysis of cases presented to the court below for its review, existing case law justifying a right to counsel on state due process grounds, and the Nebraska court's demonstrated willingness to appoint counsel as a matter of fundamental fairness, this Court should decline to exercise jurisdiction in the matter herein.

2. Unique features of Nebraska law make it inappropriate for the Supreme Court to use the case below as the cornerstone to determine whether federal constitutional law requires that an indigent defendant in a state-initiated paternity action has a right to court-appointed counsel.

The Nebraska Legislature has promulgated some unique statutes governing paternity proceedings and affording defendants certain protections in such actions. For example, Nebraska statutes regarding blood tests require that the parties involved are to "submit to genetic testing to be performed on blood or any other appropriate tissue." Neb. Rev. Stat. §43-1414 (Reissue 1984) (emphasis supplied). Thus, the testing order can go beyond blood group testing to require more sophisticated tissue typing. Moreover, the tests are not merely exclusionary but "[t]he results of the tests, including statistical probability of paternity, shall be admissible evidence and shall be weighed along with other evidence of paternity." Neb. Rev. Stat. §43-1415 (Reissue 1984). Statutes in other states such as Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington and Wyoming provide for blood testing in paternity cases, but do not provide a right to more sophisticated scientific testing, as does Nebraska.

In the case below, the Nebraska court focused on the important role played by blood testing in paternity determinations. It cited with favor an ABA-AMA joint report recommending a seven tier testing system to determine probability of paternity and noted that the facts in the case before it gave no indication that HLA testing (part of the seven tier system) had been performed. 228 Neb. at 568. Cases relied on by the Nebraska court as substantiation for its determination regarding a right to counsel also referred to the ABA-AMA joint report (see Kennedy, supra) and focused on the importance of a right to blood grouping tests and the need for counsel to assert such right and

assist in increasingly complex litigation resulting from the use of scientific evidence (see Toner, and Lavertue, supra).

The Nebraska Supreme Court cited Nebraska case law and statutes that describe paternity actions as penal in some aspects and that impose criminal sanctions on a person who is legally obligated to provide proper support for a child and intentionally does not. See Lockman v. Fulton, 162 Neb. 439,443, 76 N.W. 2d 452, 455, (1956); Neb. Rev. Stat. §25-2121 (Reissue 1985); §28-706(1) (Reissue 1985); and §43-1406 (Reissue 1984). This potential threat of imprisonment led the Nebraska Supreme Court to conclude that due process necessitated appointment of counsel.

While trial in paternity actions is generally like that of other civil proceedings, Nebraska statute provides the defendant is not entitled to a jury trial unless he requests it. Neb. Rev. Stat. §43-1412 (Reissue 1984). In addition, under Nebraska law, the testimony of the mother is not sufficient in and of itself to support a finding that the putative father is actually the father. It must be corroborated. See Neb. Rev. Stat. §43-1412 (Reissue 1984) and Gregory v. Davis, 214 Neb. 408, 334 N.W. 2d 1 (1983). Other states, such as Florida, Kansas, New York, South Carolina, Utah and Washington, make no provision for a jury trial in paternity matters under any circumstances. By affording the defendant a qualified right to jury trial, the Nebraska Legislature has reinforced the importance of counsel to the alleged father. First, the defendant would be unlikely to know of his right to jury trial unless so advised by a person knowledgeable in the law and secondly, the alleged father who did assert his right to jury trial would certainly need assistance of counsel in order to present his case effectively in such setting.

All these peculiarities of Nebraska law buttress the importance of having an attorney available to advise a paternity defendant of his rights. Moreover the Nebraska Legislature has asserted its commitment to furnishing court-appointed counsel to indigents in other contexts by mandating that parents have counsel

in proceedings regarding termination of parental rights as well as other juvenile court matters involving abuse and neglect. Neb. Rev. Stat. §43-279.01 (Cum. Supp. 1986).

Given the unique features of Nebraska law regarding paternity proceedings, the necessity of counsel in order to assert rights afforded by Nebraska law and the legislative proclivity to appoint counsel for indigents, this Court should not use Carroll v. Moore as the vehicle to determine whether the due process clause of the United States Constitution mandates court-appointed counsel for indigent defendants in state-initiated paternity actions. In Nebraska and other states that have decided this issue, fundamental concepts of fairness and a meaningful opportunity to be heard would still require appointment of counsel.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BY:

ROBERTA S. STICK, of
LEGAL SERVICES OF SOUTHEAST NEBRASKA
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161
Attorney for Respondent,
EDWIN CHARLES MOORE

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